

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 510 of 2017

Talib s/o Bashir Shaikh
Age 19 years, Occ: Education
R/o at Datta Nagar, Ranjangaon,
Taluka Gangapur District Aurangabad **... Appellant**

Versus

The State of Maharashtra **... Respondent**

....
Mr. N. S. Ghanekar, Advocate for appellant
Mr. S. P. Sonpawale, APP for respondent - State
....

CORAM : R. G. AVACHAT, J.

DATED : 27th JANUARY, 2022

J U D G M E N T :-

. This is an appeal against conviction. The appellant has been convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for six months. He is also convicted under Section 3(1) (xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act, 1989 and sentenced to suffer rigorous imprisonment for two years and pay fine of Rs.2,000/-, in

default, to suffer rigorous imprisonment for six months and convicted under Section 323 of Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and pay fine of Rs.500/-, in default, to suffer rigorous imprisonment for one month. He is also convicted under Section 506 of Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for three months.

2. The facts giving rise to the present appeal are as under:-

PW-3-X (prosecutrix) was residing at M.I.D.C., Waluj, along with her parents and siblings. In the nearby of the house of the prosecutrix, there is a closed down company "Shivshankar Industries". The prosecutrix and her family members would visit "Shivshankar Industries" premises for answering nature's call, since it was secluded place. The appellant would run a tea stall nearby the company gate.

3. The incident took place by 11.00 in the morning on 15.05.2015. The father (PW-1) of the prosecutrix had left the house for work by 9.00 in the morning. Her brother and sister had gone to

fetch water. Her mother (PW-2) was taking bath. The prosecutrix went to 'Shivshankar Industries' area for answering nature's call. She was about to remove her pant when the appellant came from backside. He covered her mouth. Gave 2-3 slaps and threatened to kill if she shouted. He, then, dragged the prosecutrix towards a dilapidated wall. Made her fall down. Removed her nicker and committed sexual intercourse with her. The prosecutrix, thereafter, returned to the house. She shared with her mother what had happened with her. As her father was busy in work, he came home by 6.00 p.m. He was informed of the incident. Then, all of them went to the M.I.D.C. Waluj Police Station. The prosecutrix lodged the First Information Report (F.I.R.) Exh.27, alleging the appellant to have had committed rape of her. It is her case that she was 15 years of age.

4. The Crime vide C.R. No.102/2015 came to be registered at M.I.D.C. Waluj Police Station, for the offence punishable under Section 376(2)(i), 323, 506 of the Indian Penal Code., 3(i)(xi) of S.C. & S.T. (Prevention of Atrocities) Act and Section 4 of the POCSO Act.

5. The investigation took place. The appellant was arrested. Both, the prosecutrix and the appellant were medically examined. Cloths on their person were seized. Their blood samples, vaginal swab etc. were obtained. The seized articles were submitted to Forensic Science Laboratory (F.S.L.). On completion of the investigation, the appellant was proceeded against by filing the charge-sheet.

6. The learned Additional Sessions Judge framed the charge. The appellant pleaded not guilty. It is his defence that the father of the prosecutrix had been to the tea stall. He had quarreled with the prosecutrix. The appellant intervened. There was, therefore, quarrel between the two. The father of the prosecutrix smashed the appellant's water glass. The brother of the prosecutrix also intervened. The appellant slapped him. Only with a view to teach a lesson to the appellant, the false F.I.R. was lodged.

7. The prosecution examined eight witnesses and produced in evidence certain documents. The appellant examined himself in his defence, besides one more witness. On appreciation of the evidence in the case, the learned Judge convicted the appellant for

various offences and therefore, sentenced to imprisonment as stated herein above.

8. Learned Advocate for the appellant would submit that a false F.I.R. was lodged. There is no evidence in proof of age of the prosecutrix. There is also no evidence to suggest that the seized articles and the samples taken for DNA were preserved and submitted in sealed condition to F.S.L. According to the learned Advocate, the appellant was about 21 years of age when the alleged offence did take place. The appellant has undergone about 7 years of imprisonment. He, therefore, alternatively urged for reducing the quantum of sentence to the period undergone if the offence is found to have been proved.

9. The learned APP would, on the other hand, submit that the prosecutrix and her parents had no reason to falsely implicate the appellant. The F.I.R. was lodged within hours of the incident. The medical examination report and DNA report reinforced the prosecution case. According to him, no interference is warranted with the impugned judgment of conviction and quantum of the sentence.

10. Considered the submissions advanced. Perused the evidence in the case. Admittedly, the prosecutrix along with her parents and siblings was residing at Waluj M.I.D.C. Her father was serving as a Watchman with a nearby company in the close vicinity of the residence of the prosecutrix. There is a closed down company - 'Shivshankar Industries'. The prosecutrix and her family members would visit - 'Shivshankar Industries' premises for answering nature's call as it was a secluded place. The appellant would run a tea stall in nearby of the 'Shivshankar Industries' gate. The prosecutrix and her family members has facial acquaintance with the appellant.

11. It so happened that the prosecutrix went to 'Shivshankar Industries' company premises at 10.00 in the morning on 15.05.2015 for answering nature's call. Her father was away at his workplace. The siblings were away from the house to fetch water. Mother was taking bath. It is in evidence of the prosecutrix that she was about to remove her pant, the appellant came from behind. He covered her mouth. Gave her 2-3 slaps. Took her towards a nearby dilapidated wall. Made her fall down and committed sexual intercourse without her consent. It is further in her evidence that thereafter, she came

home and informed her mother. The mother contacted the father. He came home in the evening. He too was informed. All of them went to the Police Station. The prosecutrix lodged the F.I.R. Exh.27.

12. The prosecutrix was subjected to a searching cross examination. Two days after the registration of F.I.R., she had accompanied the police to point out the scene of offence. She pointed out two places. After having pointed out the first place, one of the police personnel in the company expressed that if the offence was committed at the first place, there should have been injuries on her person. She therefore changed the place of incident. She has categorically denied that her father was at home on the fateful day. In her cross examination, she admitted to have not put up resistance since the appellant had given her slaps and threatened as well.

13. Close scrutiny of the evidence of the prosecutrix undoubtedly suggests that she stood by her case in the F.I.R. The prosecutrix had not given her age in her oral evidence. While she gave her name before start of recording of her evidence, she stated that she was 15 years of age.

14. To corroborate the evidence of the prosecutrix, her parents were examined (PW-1 and PW-2). Both these witnesses gave evidence consistent with the evidence of their daughter. It is in the evidence of the mother that the prosecutrix came home, crying. She informed her what had happened with her. She, therefore, contacted her father on phone. As the father was busy in work, he came in the evening. The father was not informed what happened with the prosecutrix. It is only on his return home, he was informed about the same. Both these witnesses also denied the case of the appellant that was put to them in their cross examination. It is, however, to be noted that, both these witnesses being parents of the deceased, were expected to give date of birth or exact age of the prosecutrix. Their evidence in this regard is however silent. The fact remains that the oral evidence of the prosecutrix got reinforced by the evidence of her parents.

15. The prosecutrix was medically examined soon after registration of the F.I.R. PW-7 – Sasmit Anil Jaiswal (Doctor), testified that on 16.05.2015, he examined the prosecutrix. On her examination, he found that there was penetrative sexual intercourse. He, therefore, obtained vaginal swab, vaginal smear, pubic hair, nails

and blood as well. He gave the medical examination report vide Exh.45. In the cross examination, the Medical Officer testified that injuries noticed on the hand of the prosecutrix were superficial and might have been self inflicted. He also opined that by other reasons hymen can get torn. The fact however remains that the prosecutrix was medically examined within hours of the incident. The medical examination report suggest that she was subjected to sexual intercourse. The prosecutrix had given history of sexual assault. The same being her previous statement, reinforced her case before the Court.

16. The Investigating Officer (PW-8) testified that all the seized articles were referred to the Chemical Analysis (C.A.) vide its letter dated 17.05.2015. The learned Additional Sessions Judge has observed thus:

DNA & C.A. REPORTS :-

19/- It is pertinent to note that the blood samples of the victim and the accused along with vaginal swab, vaginal smear of the victim were sent for D.N.A. as well as C.A. The clothes of the accused as well as the victim were also sent for chemical analysis. After perusing the C.A. report Exh.61, it is seen that few semen stains were detected on the salwar of the victim. The DNA Reports at Exh.55 & 56 makes out that the semen stain on the cutting of salwar of the victim, vaginal swab and pubic hair of the victim were found to be from the same paternal progeny of the blood

sample of Talib Bashir Shaikh i.e. accused. They further makes out that the semen stain cutting from Salwar and the vaginal swab of the victim and the blood sample of Talib Bashir Shaikh i.e. accused are identical and from one and the same source of male origin. Thus the DNA reports at Exh.55 & 56 and the C.A. report at Exh.61 which are positive in nature also corroborates the evidence of the victim. The DNA report makes out that the semen found on the salwar of the victim as well as in the vaginal swab of the victim is identical with the blood sample of the accused. Considering the said reports, here I would like to state that the defence put-forth by the accused by examining himself and one witness by name Sanjay Magre appears to be after-thought one. The DNA and C.A. Reports clearly implicates the accused thereby negating the defence of false implication.

17. The DNA report goes in evidence as it is without examination of an expert. True, the blood and semen samples and other articles ought to have been preserved and handed over to the C.A. in sealed condition. There is, however, no evidence in this regard. It however appears that the Investigating Officer was not subjected to cross examination on this point. The C.A./DNA report reinforced the case of the prosecution. It is reiterated that it is not the case of the appellant that it was a consensual act. Even we ignore the C.A. and DNA report, the evidence of the prosecutrix coupled with her medical examination report does indicate the appellant to have had sexual intercourse with her without her consent and against her wish. The same constitutes the offence of rape.

18. The question is whether the prosecutrix was below 16 years of age when the offence did take place. The evidence of her parents on the point of her age would have been the best evidence. None of them however gave date of her birth. PW-4, Headmistress of Zilla Parishad Primary School, Ranjangaon, produced school record. The date of birth of the prosecutrix is said to be 25.05.2000. This witness admitted that the prosecutrix was admitted in the school in third standard. The admission was given on the basis of Transfer Certificate issued by her previous school. Witness could not tell on what basis entry about date of birth was taken in the previous school record.

19. In view of this Court, the evidence of PW-4 and what had been stated by the prosecutrix before commencement of her examination-in-chief ought not to have been taken by the trial Court to hold her to be below 16 years of age. In view of this Court, there is no evidence to establish the prosecutrix was below 16 years of age on the given day.

20. As regards the offence under the S.C. and S.T. Act is concerned, there is no evidence to suggest that the appellant was in

the known of the caste of the prosecutrix when he committed the offence. In my view, the prosecution thus failed to make out the appellant to have committed offence under Section S.C. and S.T. Act.

21. As such, the appellant is proved to have committed offence of rape punishable under Section 376(1) of the Indian Penal Code. The said offence was punishable imprisonment for a term not less than seven years. The appellant was 21 years of age when he committed the offence. He has been behind the bars for little over six years. Considering his age and in the facts and circumstances of the case, this Court is inclined to reduce the quantum of sentence to a period of seven years. With this, the appeal partly succeeds in terms of following order:

ORDER

- (i) The appeal is partly allowed.
- (ii) The order convicting the appellant for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is hereby set aside.

- (iii) The appellant is acquitted of the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.
- (iv) The appellant is convicted for the offence punishable under Section 376(1) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and pay fine of Rs.2,000/- (Rupees Two Thousand), in default of payment of fine, he shall undergo rigorous imprisonment for three months.
- (v) Rest of the terms of the impugned order of conviction and sentence to stand unaltered.
- (vi) Fine amount if paid in excess, be refunded to the appellant.

[R. G. AVACHAT, J.]

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